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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matters of:	)	
	)	
Deployment of Wireline Services Offering	)	CC Docket No. 98-147
Advanced Telecommunications Capability	)	
	)	
	)	

COMMENTS OPPOSING BELLSOUTH'S PETITION FOR A CONDITIONAL WAIVER

1. ITC^DeltaCom, Inc. d/b/a ITC^DeltaCom Communications, Inc., (hereinafter "ITC^DeltaCom,") hereby files these Comments opposing BellSouth's petition for a conditional waiver as that waiver would impact certain state commission orders establishing cageless collocation provisioning intervals.

Summary

2. On December 1, 2000, BellSouth Telecommunications, Inc., (hereinafter "BellSouth") filed a Petition for Conditional Waiver claiming that three states "have not set a state provisioning interval standard ..." BellSouth did not specify the three states.

3. On or about June 11, 1999 ITC^DeltaCom filed for arbitration pursuant to Section 252(b)(1) of the Telecommunications Act of 1996 with BellSouth in eight of the nine states. One of the issues which was the subject of that arbitration was the provisioning interval for cageless collocation.

4. Between June of 1999 and January 2000, ITC^DeltaCom arbitrated with seven of the nine BellSouth state commissions the issue of the appropriate provisioning interval for cageless

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collocation. Three state agencies have issued orders – the Alabama Public Service Commission, the Georgia Public Service Commission, and the Tennessee Regulatory Authority. In each case, both BellSouth and ITC^DeltaCom, after conducting discovery, presented testimony in a full hearing before the Commission or the Authority. In each arbitration decision, the Commission or Authority established provisioning intervals for cageless collocation. Those orders are attached to this filing as Exhibit A.

5. The state orders referenced in Exhibit A establish a cageless collocation provisioning interval and in Alabama, the order also includes a response time interval for collocation applications. Each order establishes state commission effective standards that cannot and should not be circumvented. If BellSouth needs a "waiver" or desires to appeal the decisions of these three state Commissions, then BellSouth has the right to seek such waiver from the appropriate state Commission or may pursue an appeal as established by the guidelines of the Telecommunications Act of 1996. BellSouth should not be granted a waiver by the FCC that permits BellSouth to avoid the obligations that these three state commission decisions reached after a full evidentiary hearing and much time and effort by the Commissions and their staffs.

6. The FCC has encouraged state commissions to establish collocation intervals and rates that are nondiscriminatory.[1] The FCC should not now, permit a wavier that effectively nullifies the decisions of those state commissions who established collocation standards in arbitration decisions.

[1] "We encourage state commissions to ensure that incumbent LECs are given specific time intervals within which they must respond to collocation requests. We urge the states to ensure that collocation space is available in a timely and pro-competitive manner that gives new entrants a full and fair opportunity to compete." *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, First Report and Order, CC Docket 98-147 ¶ 54, 55 (released March 31, 1999).

WHEREFORE, ITC^DeltaCom respectfully requests that the Commission deny BellSouth's Petition for a Conditional Waiver for the reasons set forth above.

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Dated: December 28, 2000.

CERTIFICATE OF SERVICE

A copy of the foregoing Comments was mailed on this the 28th day of December, 2000, by First Class, United States Mail, postage prepaid, upon all the parties of record listed below, and a copy of the Comments and the Petition for Conditional Wavier was sent via overnight mail to the Alabama and Georgia Public Service Commissions and the Tennessee Regulatory Authority.

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EXHIBIT A

STATE OF ALABAMA
ALABAMA PUBLIC SERVICE COMMISSION
P.O BOX 991
MONTGOMERY, ALABAMA 36101-0991

In the Matter of:	)	**DOCKET** 27091
	)	
Petition by ITC^DeltaCom Communications, Inc. for	)	
Arbitration of Interconnection Agreement with	)	
BellSouth Telecommunications, Inc	)	
Pursuant to Section 252(b) of the	)	
Telecommunications Act of 1996	)	

FINAL ORDER ON ARBITRATION

BY THE COMMISSION:

HEARD: Tuesday, January 18, 2000, Commission Hearing Room 904, RSA Union Building, 100 North Union Street, Montgomery, Alabama

BEFORE: The Honorable Terry L. Butts - Arbitration Facilitator, Mary Newmeyer - Arbitrator, and Larry Smith - Arbitrator

APPEARANCES:

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I. INTRODUCTION/BACKGROUND

This arbitration proceeding is pending before the Alabama Public Service Commission (hereinafter Commission) pursuant to Section 252(b) of the Telecommunications Act of 1996 (hereinafter Act or the 1996 Act).[1] This proceeding was initiated by ITC^DeltaCom, Inc.'s (hereinafter DeltaCom) filing of a *Verified Petition for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc.* (hereinafter BellSouth) *Pursuant to Section 252(b) of the Telecommunications Act of 1996* (hereinafter Petition) on June 11, 1999. By its Petition, DeltaCom requested that the Commission arbitrate certain terms and conditions with respect to an interconnection agreement between itself as the petitioning party and BellSouth. On July 6, 1999, BellSouth filed its *Verified Response to ICG's Petition For Arbitration* (hereinafter Response).

In accordance with the Commission's Telephone Rule T-26(C), the Commissioners appointed The Honorable Terry L. Butts, as Arbitration Facilitator, and Mary Newmeyer, Utility Rate Supervisor, and Larry Smith, Utility Rate Supervisor, as Arbitrators in this Matter (hereinafter Arbitration Panel or Panel).

On June 11, 1999, DeltaCom filed a petition for arbitration and submitted a proposed interconnection agreement and a list of issues on which the parties could not agree. DeltaCom filed direct testimony and relevant discovery of BellSouth. DeltaCom witnesses included Christopher J. Rozycki, Michael Thomas, Thomas Hyde and Don J. Wood. On January 6, 2000, DeltaCom filed revised testimony for Christopher J. Rozycki.

On July 6, 1999, BellSouth filed a response to DeltaCom's petition for arbitration, responses to DeltaCom's data requests, and direct testimony. BellSouth's witnesses included Alphonso J. Varner, Ronald M. Pate, David P. Scollard, D. Daonne Caldwell, David L. Thiery, William E. Taylor, and W. Kieth Milner. BellSouth also filed its first interrogatories and first request for production of records to DeltaCom. On December 27, 1999, BellSouth filed revised testimony for Alphonso J. Varner.

On August 20, 1999, DeltaCom and BellSouth filed a joint motion to establish a procedural schedule. On October 1, 1999, both parties jointly filed a list of remaining issues. On October 14, 1999, DeltaCom filed rebuttal testimony for Christopher J. Rozycki, Thomas Hyde, Michael Thomas, and Don J. Wood. On the same date BellSouth filed rebuttal testimony for Alphonso J. Varner, D. Daone Caldwell, David A. Coon, Ronald M. Pate, W. Keith Milner, and William E. Taylor.

The arbitration panel issued an order on November 11, 1999 continuing the arbitration hearing and establishing an informal meditiation on November 11, 1999. On December 20,

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[1] Pub. L. 104-104.110 Stat. 56 Codified at 47 U.S.C. §§151 et seq.

1999, the Office of Attorney General of the State of Alabama filed a request for participation as an interested party.

The Arbitration Panel conducted hearings on January 18 and 19, 2000, regarding the remaining issues. At the outset of the arbitration hearings the parties informed the Panel that they had resolved all but the following issues:

1. Should BellSouth be required to comply with the performance measures and guarantees for pre-ordering, resale, and unbundled network elements (UNEs), provisioning, maintenance, interim number portability and local number portability, collocation, coordinated conversions and the bona fide request processes as set forth in Attachment 10 of Exhibit A of this Petition?

2. Pursuant to the definition of parity, agreed to by the parties, should BellSouth be required to provide the following and if so under what conditions and at what rates; (1) Operational Support Systems (OSS) and (2) UNEs.

   Should BellSouth be required to provide an unbundled loop using IDLC technology which will allow ITC^DeltaCom to provide consumers the same quality of service as that offered by BellSouth to its customers?

   Until the Commission makes a decision regarding UNEs and UNE combinations, should BellSouth be required to continue providing those UNEs and combinations that it is currently providing to ITC^DeltaCom under the interconnection agreement previously approved by this Commission?

   Should BellSouth be required to provide to ITC^DeltaCom extended loops or the loop/port combination? If so, what should the rates be?

3. Should BellSouth be required to pay reciprocal compensation to ITC^DeltaCom for all calls that are properly routed over local trunks, including calls to Information Service Providers (ISPs)?

   What should be the rate for reciprocal compensation per minute of use, and how should it be applied?

4. Should BellSouth provide cageless collocation to ITC^DeltaCom 30 days after a complete application is filed?

5. Should the parties continue operating under existing local interconnection arrangements?

6. What charges, if any should BellSouth be permitted to impose on ITC^DeltaCom for BellSouth OSS?

   What are the appropriate recurring and non-recurring rates and charges for BellSouth two-wire and four-wire ADSL/HDSL compatible loops, two-wire SL2 loops, two-wire SL1 loops, two-wire SL2 loop order coordination for specified conversion time?

   What should be the appropriate recurring and nonrecurring charges for cageless and shared collocation in light of the recent FCC Advanced Services Order No. FCC 99-48, issued March 31, 1999, in Docket No. CC 98-147?

7. Which party should be required to pay for the Percent Local Usage (PLU) and the Percent Interstate Usage (PIU) audit, in the event such audit reveals that either party was found to have overstated the PLU or PIU by 20 percentage points or more?

8. Should the losing party to an enforcement proceeding or proceeding for breach of the interconnection agreement be required to pay the costs of such litigation?

> Should language covering tax liability be included in the interconnection agreement, and if so, should that language simply state that each party is responsible for its tax liability?
>
> Should BellSouth be required to compensate ITC^DeltaCom for breach of material terms of the contract?

BellSouth and DeltaCom filed post-hearing briefs on February 22, 2000. We address the unresolved issues in this report and recommendation.

II. FINDINGS AND CONCLUSIONS

Issue 1(a) Performance Measurements and Performance Guarantees:

Should BellSouth be required to comply with the performance measures and guarantees for pre-ordering, resale, and unbundled network elements (UNEs), provisioning, maintenance, interim number portability and local number portability, collocation, coordinated conversions and the bona fide request processes as set forth in Attachment 10 of Exhibit A of this Petition?

The ITC^DeltaCom Position

DeltaCom believes that performance guarantees are necessary because BellSouth has competitive and financial incentives to block the entry of DeltaCom into the Alabama local market. Also, as the owner of the local loop, BellSouth has the means to limit DeltaCom's ability to provide quality service. DeltaCom points out that seeking redress through the regulatory complaint process or through the courts is both wasteful and ineffective in a competitive environment. Tr. 111-113.

DeltaCom contends that this Commission not only has the authority but the duty to establish performance measures and guarantees under Section 252(b) and 252(c) of the 1996 Act. Section 252(b)(4)(C) of the Act states that the state commission shall resolve each issue brought it in arbitration. DeltaCom witness, Christopher Rozycki, also pointed out that California and Texas are in the process of adopting performance measures. In addition, Mr. Rozycki revealed that an interconnection agreement between AT&T and Southwestern Bell Telephone Company in Texas contains measures and penalty provisions for non-compliance. Tr. 130.

DeltaCom's proposal has three tiers. The first tier involves the waiver of nonrecurring charges in a variety of circumstances in which BellSouth fails to perform. Tr. 114-15. The second tier of guarantees is triggered when BellSouth fails to meet a measurement in two out of three months during a quarter. Under these circumstances BellSouth pays $25,000 in penalties. Tr. 115. The third level of guarantee compensation is triggered only in cases of extreme and extraordinary nonperformance, where BellSouth fails to meet a single measure five times during a six-month period. For those extreme cases, BellSouth must pay guarantees of $100,000 for each default for each day the default continues. Tr. 116.

The BellSouth Position

In its brief and in testimony BellSouth submitted that it is utilizing a set of Service Quality Measures on a monthly basis for Commission review. These measures were developed as a result of proceedings before the Louisiana Public Service Commission, Docket No. U-22252-C, the Georgia Public Service Commission Docket 7892-U, and in response to the Notice of Proposed Rulemaking issued by the Federal Communications Commission (FCC) in Docket 98-56. BellSouth contends that performance measures should be the same for all CLECs and should not be based upon a proposal by the Texas Commission staff.

BellSouth also contends that any performance guarantees are beyond this Commission's authority; see Chapter 37, *Code of Alabama* 1975. See also *Comer v. QAI, Inc.*, Docket No. 26331 (Alabama Public Service Commission, June 16, 1998)

BellSouth witness, Dr. William E. Taylor, described DeltaCom's performance guarantees as a problem of moral hazard. According to Dr. Taylor, moral hazard is a form of gaming by which one party to a contract may resort to actions – within the framework of the existing contract – that create an unanticipated competitive or financial advantage for that party at the expense of the other party to that contract. Tr. 977.

Discussion of Issue 1

It appears to the panel that BellSouth has incentive to delay the execution of duties within the DeltaCom/BellSouth contract in order to deter competition. Also because of the complaints voiced by the CLECs concerning performance measures in Docket 25835, we view performance measures and guarantees as a serious issue. However, we need input from all of the affected parties in order to have a complete record regarding performance measures. Under Section 271 of the Telecommunications Act of 1996, this commission has the obligation to review a list of 14 checkpoints in order to determine BellSouth's compliance with that list of parameters. This Commission's record will be reviewed by the Federal Communications Commission (FCC) which will then make a determination of BellSouth's compliance with the checklist. This 14-point checklist is a tool to determine whether or not BellSouth is providing sufficient access and interconnection to its networks to allow competition to develop. Under Section 271 the FCC will determine whether BellSouth has provided nondiscriminatory access to its network, databases, and Operations Support Systems (OSS).

As stated by the parties, various state commissions and the FCC are considering performance measures and guarantees. This commission is monitoring the progress of these proceedings. This commission is also cognizant of the failure of Bell Atlantic's operational support systems after Bell Atlantic's entry into interLATA service in New York.

The panelists believe that this subject is of extreme importance to the CLEC community and to the development of competition. The panelists are also aware that the CLEC community does not have the resources to have each and every complaint heard before this Commission or in a court of law. In order to develop a complete record we believe that the Commission should conduct hearings to determine if performance measures and guarantees should be developed for BellSouth and if so, determine what performance measures should be considered. The Commission can open a generic docket for consideration of performance measures or consider performance measures under Docket 25835.

Conclusion to Issue 1

Based upon the foregoing discussion, the Arbitration Panel recommends that the Commission open a generic docket to consider what, if any, performance measures, standards and guarantees should be put in place for BellSouth in order to assure that CLECs receive nondiscriminatory access to BellSouth's OSS.

The Findings and Conclusions of the Commission as to Issue No. 1

The Commissions concurs with the findings and conclusions of the Arbitration Panel concerning this issue. We accordingly adopt the findings and conclusions of the Arbitration Panel in that regard as our own.

IT IS SO ORDERED BY THE COMMISSION

Issue 2 - Parity - General (GTC - 3.2;Att. 2-2.3.1.4; Att. 6-1.1)

Pursuant to the definition of parity, agreed to by the parties, should BellSouth be required to provide the following, and if so, under what conditions and at what rates; (1) Operational Support Systems (OSS) and (2) UNEs.

The ITC^ DeltaCom Position

DeltaCom asserts that the FCC's November 5, 1999, Third Report and Order in Docket 96-98 in response to the remand of FCC Rule 319 reaffirms that OSS are UNEs for purposes of Section 251(c)(3) of the Act and that access to OSS must be made available at nondiscriminatory rates, terms, and conditions. DeltaCom argues that BellSouth does not provide OSS at parity, which is illustrated by the fact that 62 percent of the orders submitted electronically by DeltaCom fall out for manual processing by design. Tr. 469. A DeltaCom order for six lines for a customer who wants to utilize a PBX will not flow through. The same type of order submitted by BellSouth for its retail customers is fully processed electronically according to DeltaCom.

DeltaCom explained that the costs associated with OSS are development costs and usage costs. DeltaCom argues that BellSouth should not be allowed to charge CLECs for development costs. Also, DeltaCom points out that OSS costs were imposed upon BellSouth by Congress through the 1996 Act as a requirement for BellSouth to meet before it can offer interLATA service. Because of the requirement, DeltaCom believes that BellSouth should pay its own development costs.

DeltaCom also argues that the UNEs should be provided by BellSouth at cost based rates which comply with the requirements of Section 251(c) of the Act and the FCC's pricing rules which were reinstated by the U.S. Supreme Court in *AT&T Corp. v Iowa Utilities Bd,* 525U.S. 366,119S.CT., 721,142 L.Ed.2d.835 (1999). DeltaCom asserts that FCC rules require that BellSouth modify its assumed fill factors and assumed utilization of IDLC technology. With higher fill factors the costs of UNEs will decrease by 5-6 percent according to DeltaCom. Tr. 324-326. DeltaCom also argues that BellSouth's cost study, which is utilized to derive Alabama's rates, is not based upon TELRIC principles.

The BellSouth Position

BellSouth contends that DeltaCom is not entitled to any relief regarding this issue because BellSouth complies with the requirements for this issue. BellSouth states that it currently provides CLECs with nondiscriminatory access to electronic interfaces to BellSouth's OSS. These interfaces include Local Exchange Navigation System and the Telecommunications Access Gateway (TAG) for pre-ordering, ordering, and provisioning; Electronic Data

Interchange (EDI) for ordering and provisioning; Trouble Analysis and Facilities Interface for maintenance and repair; and Optional Daily Usage File, Enhanced Optional Daily Usage File, and Access Optional Daily Usage File for billing. BellSouth alleges that these interfaces allow CLECs to perform pre-ordering, ordering, provisioning, maintenance, and repair in substantially the same time and manner as BellSouth does for itself. Also these interfaces allow the CLECs a meaningful opportunity to compete in the case of unbundled network elements according to BellSouth witness, Pate. Tr. 1149-1153.

BellSouth avers that the flow-through rate for these interfaces is 90 percent. Tr. 1149-1150. Regarding the flow through of orders, BellSouth explains that the orders referenced by DeltaCom are complex orders, which are less suitable for mechanization than simple orders. Tr. 1153-1154. BellSouth states that EDI and TAG are designed to accept local service requests (LSRs) for only four complex orders: PBX trunks, Synchronet, ISDN Basic Rate Service, and hunting. The LSRs for these services can be submitted electronically, but these orders will fall out for manual handling. Tr. 1155.

With regard to access to unbundled network elements, BellSouth contends that the 1996 Act and the FCC only require meaningful opportunity to compete, not access in accordance with the same installation, maintenance, and repair intervals that apply to BellSouth's retail services as DeltaCom contends. Tr. 637-639.

Discussion of Issue 2 – Parity – General

In discussing parity of Operational Support Systems (OSS) we must consider whether BellSouth is providing nondiscriminatory access to its OSS. Consideration of nondiscriminatory access involves performance measures. Performance measures were discussed in Issue 1(a). We have discussed the issue of nondiscriminatory access to UNEs in the discussion of Integrated Digital Loop Carrier (Issue 2(a). We discussed the rates to be charged for OSS and UNEs in Issue 6(a) and Issue 6(b) respectively.

Conclusion to Issue 2 – Parity - General

The issue of parity in general is one that involves the consideration of performance measures and as such should be considered when performance measures and guarantees are considered in a generic docket. Thus, we reiterate our recommendation that the Commission open a generic docket to consider performance measures and guarantees.

With regard to the rates to be charged for OSS and other UNEs, we recommend that the Commission open a cost docket to consider all rates for UNEs as recommended in our conclusions to Issues 6(a) and 6(b). However, the Eighth Circuit's recent decision regarding the FCC TELRIC pricing rules has created uncertainty regarding UNE pricing. Thus, we believe that any consideration of UNE rates should be delayed until the pricing rules are clearly defined.

The Findings and Conclusions of the Commission as to Issue No. 2 – Parity - General

The Commissions concurs with the findings and conclusions of the Arbitration Panel concerning this issue. We accordingly adopt the findings and conclusions of the Arbitration Panel in that regard as our own.

IT IS SO ORDERED BY THE COMMISSION

Issue 2(a)(iv) - Parity - Integrated Digital Loop Carrier (IDLC)(Att. 2-3.1)

Should BellSouth be required to provide an unbundled loop using IDLC technology which will allow ITC^DeltaCom to provide consumers the same quality of service as that offered by BellSouth to its customers?

The ITC^DeltaCom Position

DeltaCom states that Section 251(c)(3) of the Act requires BellSouth to provide access to UNEs in a nondiscriminatory manner. According to DeltaCom, BellSouth is not providing nondiscriminatory access to DeltaCom for customers formerly served by BellSouth via Integrated Digital Loop Carrier (IDLC). DeltaCom stated that these customers receive inferior service compared to the service BellSouth provides via IDLC because BellSouth does not correctly provision this UNE. DeltaCom contends that BellSouth uses either long copper loops which result in a substandard loop with excessive loss of speed and an increased likelihood of noise problems or BellSouth uses outdated Universal Digital Loop Carrier (UDLC) technology that increases the costs and does not always provide the same quality service and features of IDLC. Tr. 544-547.

DeltaCom explained that converting a customer from IDLC to UDLC adds two additional analog to digital conversions in the CLEC's pathway. These conversions degrade modem capability and other features such as forward disconnect. DeltaCom contends that it is contrary to the Act and anti-competitive for BellSouth to convert a customer from IDLC to UDLC when that customer selects DeltaCom. According to witness Hyde, the CLEC does not know whether a potential customer is on IDLC or not. Frequently, the CLEC's first knowledge of the problem created by the use of other technologies is when the customer start complaining. Hyde at Tr. 548-549. The company does not have positive confirmation before hand that an existing BellSouth customer is on IDLC. Therefore, they do not know whether the service will work correctly until the order is processed, provisioned and installed, Hyde at Tr. 703.

DeltaCom recognized that the Commission in the *UNE Generic Pricing Docket* (Docket 26029)[2] gave CLECs the ability to request a digital interface off IDLC loops in order to solve some of the problems. DeltaCom asserted that it was in the process of finalizing the Bona Fide Request (BFR) to BellSouth for that digital interface when the arbitration started. DeltaCom explained it has not filed the BFR because BellSouth informed them that all BFRs that were not yet completed would be put on hold and that all new ones would be put on hold as well do to the filing for arbitration. See Hyde at Tr.550. This information was given to Mr. Hyde in early June 1999 by Brenda Douglas of the BellSouth account team that handles the DeltaCom account. The issue was later escalated to Mr. Trivett Finlan, a negotiator in the arbitration. Mr. Finlan stated that DeltaCom did not have an agreement; thus, they could not file an amendment to it and a BFR is an amendment. Tr. 661-662. When asked about the South Carolina and Florida decisions, which required DeltaCom to submit a BFR requesting the specific transmission parameters, Mr. Hyde replied:

> That is correct. However, the transmission specification parameters we're looking for are exactly those that BellSouth provides to the end user, with the

2 *In the Matter of Generic Proceedings: Consideration of TELRIC Studies*, Docket No. 26029 (Alabama Public Service Commission, August 25, 1998) (hereinafter the *UNE Pricing Docket*).

> exception of the BFR as was present in the UNE docket order in Alabama, which is a digital interface IDLC, which doesn't exist as a UNE today. Excluding that, we are not looking for some special service over and above what BellSouth gives their own customers. We really just want the equality of services, not the--some special high quality service. Hyde Tr. 656-657

DeltaCom has requested that the Commission require BellSouth to provide IDLC equivalency, not necessarily IDLC. DeltaCom states that the Tennessee Regulatory Authority required this equivalency in a recent arbitration, TRA Docket No. 97-01262, November 3, 1999. See DeltaCom Exhibit 19. DeltaCom also states that the Louisiana Public Service Commission staff recommended that BellSouth must provide, at a minimum, an equivalent product to BellSouth's IDLC loop, LPSC Docket No. U-24206, Post Hearing Brief of LPSC Staff, November 30, 1999. See DeltaCom Exhibit 10. DeltaCom maintains that this Commission should require BellSouth to provide UNE loops to DeltaCom with the same quality as those it uses to serve BellSouth retail customers. Further, where IDLC technology is utilized to serve BellSouth retail customers, an IDLC equivalent technology must be made available to DeltaCom to serve its customers. DeltaCom contends that such equivalent technology is the minimum requirement for a level playing field.

The BellSouth Position

BellSouth stated that it provides access to all of its loops on an unbundled basis, including those loops served by IDLC technology. Currently seventeen percent of loops in Alabama are served utilizing IDLC. Milner, Tr. at 1218. BellSouth has indicated that it utilizes six technically feasible methods to unbundle IDLC delivered loops including the use of copper facilities, integrated network access systems, side door or hair-pin arrangements, digital side door arrangements, next generation digital loop carrier facilities, and non-integrated or universal digital loop carrier system. Tr. at 1215-1217. BellSouth witness, Milner stated that BellSouth is willing to consider any other technically feasible method proposed by DeltaCom. Milner at Tr. 1215.

BellSouth asserts that its own customers are served by a variety of copper loops, loops served by IDLC equipment, and loops served by non-IDLC equipment. Further, BellSouth's retail customers are subject to being moved from one type of serving facility to another as engineers execute loop rearrangements to economically serve particular geographic areas. With regard to the basic issue of parity, CLEC end users and BellSouth retail customers are both subject to being served by a variety of methods, all of which provide service in compliance with published technical service descriptions. Milner at Tr. 1218.

BellSouth maintains that for the vast majority of loops, forward disconnect is supported for both CLEC's end-users and BellSouth's retail customers. BellSouth's technical specifications for unbundled loops clearly explain that forward disconnect may not work on certain UNE loops. Some older digital loop carrier systems still in service in the BellSouth network are not capable of providing forward disconnect signaling. These systems comprise a very small and decreasing portion of BellSouth's network. On loops utilizing these older systems, BellSouth cannot provide forward disconnect regardless of whether the customer is a CLEC end-user or a BellSouth customer. Milner at Tr. 1219

Discussion of Issue 2(a)(iv)

Section 251(c)(3) of the Act imposes a duty on incumbent local exchange carriers (ILECs) to provide to any requesting telecommunications carrier for the provision of a telecommunications service nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of Section 252. DeltaCom asserts that in accordance with Section 251(c)(3) BellSouth must provide DeltaCom access to UNEs in a manner that is at parity with which it provides to itself. DeltaCom asks this Commission to require BellSouth to provide IDLC *equivalency*, not necessarily IDLC itself.

The majority of problems and concerns regarding this issue appear to be generated when a customer served by IDLC is moved to UDLC or when excessively long copper loops are used. When a loop serviced over IDLC is converted to UDLC an extra analog to digital conversion is required. This additional conversion will always degrade the V.90 modem service. Additionally, the loss of the capability for forward disconnect sometimes occurs when the customer's service is moved from IDLC to UDLC. Using long copper loops for IDLC creates transmission problems such as excessive noise and reduced data transmission speeds.

Both parties indicated there were four to six technically feasible methods to unbundled IDLC delivered loops. BellSouth listed six methods; however, DeltaCom indicated that there are only four methods because there is an overlap among these methods. Whether there are four methods or six methods, it is evident that the quality of service to the end-user customer varies considerably depending on what methodology is utilized. BellSouth currently provides IDLC-equivalent service to DeltaCom, in some limited instances, by providing loop UNEs via the "side door" IDLC methodology that splits the loop off the switch. This method has provided IDLC-equivalent service to DeltaCom in the small number of instances where it has been deployed. However, Mr. Hyde indicated that the majority of IDLC served UNE loops purchased by DeltaCom have been converted to UDLC.

BellSouth insists that DeltaCom should have used the Bona Fide Request process referred to by the Commission in Docket No. 26029 to obtain a digital interface for IDLC. The testimony in this arbitration clearly shows, however, that DeltaCom was specifically informed by BellSouth personnel both from the account team and the negotiators that nothing would be done with the BFR if it was submitted by DeltaCom once it had requested arbitration. The arbitration panel is concerned that generally the responses to BFRs do not appear to be addressed in a timely manner. These delays thwart the intention of the Commission in its determination to use this process for IDLC in Docket 26029. It is also appropriate to note that the Commission's decision in that docket was issued under the conditions created by the Eighth Circuit Decision, which the Supreme Court Decision overturned on January 25, 1999.

The FCC stated in Docket 96-98 in its discussion of the purchase of unbundled loops from incumbents at ¶ 389 that:

> Section 251(d)(2)(B) directs the Commission to consider whether 'the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide service that it seeks to offer.' We have interpreted the term impair to mean either increased cost or

decreased service quality that would result from using network elements of the incumbent LEC other than the one sought.

In this arbitration proceeding, DeltaCom has requested that the Commission require BellSouth to provide IDLC equivalency, not necessarily IDLC. The use of inferior technologies such as UDLC to replace IDLC served loops impairs "the ability of the telecommunications carrier seeking access to provide service that it seeks to offer." The end users should not be negatively affected by competition. When DeltaCom obtains a customer from BellSouth it does not know whether that customer is served by an IDLC loop or what method BellSouth will use to unbundle that IDLC loop. It also does not know if the same services the customer received from BellSouth will work when the unbundled loop is provided by DeltaCom.

The arbitration panel believes that parity exists when the end user customer receives the same level and quality of service from DeltaCom that they received from BellSouth. To fulfill the intent of the Act, DeltaCom must receive IDLC equivalent service when the unbundled loop it buys was served by IDLC. The method used by BellSouth to unbundle the loop must provide the same level and quality of service as BellSouth provided to the end user customer.

Conclusion to Issue 2(a)(iv)

Based upon the foregoing evidence, the Arbitration Panel finds that BellSouth is required to provide IDLC equivalency. For customers served by IDLC technology, BellSouth must provide an unbundled loop that will allow end users to obtain the same level of service and performance as provided by IDLC. The unbundled loop should deliver to DeltaCom a digital signal equivalent to that which enters a switch when IDLC is used. No additional digital-to-analog or analog-to-digital conversions should be required in excess of that required for BellSouth's retail service.

The Findings and Conclusions of the Commission as to Issue No. 2(a)(iv)

The Commissions concurs with the findings and conclusions of the Arbitration Panel concerning this issue. We accordingly adopt the findings and conclusions of the Arbitration Panel in that regard as our own.

IT IS SO ORDERED BY THE COMMISSION

Issue 2(b)(ii) - UNEs - Elements Offered (Att. 2 - 1.3,2.3.1.3,2.3.1.7)

Until the Commission makes a decision regarding UNEs and UNE combinations, should BellSouth be required to continue providing those UNES and combinations that it is currently providing to ITC^DeltaCom under the interconnection agreement previously approved by this Commission?

Issue 2(b)(iii) - **UNEs - Extended Loops and Loop/Port Combinations** (Att. 2 - 1.3,2.3.1.3,2.3.1.7)

Should BellSouth be required to provide to ITC^DeltaCom extended loops or the loop/port combination? If so, what should the rates be?

The ITC^DeltaCom Position

DeltaCom states that the combination of an unbundled loop, cross connect, and special access transport is an extended loop. DeltaCom asserts that this combination enables it to provide service to areas of Alabama where collocation is not yet economically feasible. The loop/transport combinations sought in this Docket will allow DeltaCom to provide service outside of most densely populated areas of the state. According to DeltaCom, BellSouth currently combines those elements when it offers service using a special access circuit. Tr. 906.

DeltaCom avers that such combinations are routine in the BellSouth network. Thus, those facilities are used in combination with each other in the BellSouth network by BellSouth to provide service to BellSouth customers. DeltaCom claims that under FCC Rule 315(b) BellSouth must provide extended loops to DeltaCom. In its First Report and Order in Docket 96-98,[3] the FCC stated that the proper reading of "currently combines" is ordinarily combined within their network in the manner which they are typically combined.

DeltaCom states that over the past two years, BellSouth has provided approximately 2,500 extended local loops to DeltaCom in the BellSouth region with more than 1,000 of those provided to DeltaCom in Alabama. Tr. 894. DeltaCom argues that without continued access to extended loops, it will be forced to curtail efforts to provide service to customers who want to be served by DeltaCom. According to DeltaCom this result is contrary to the 1996 Act, as well as contrary to FCC policy, the public interest and the past policies of this Commission. DeltaCom argues the existing agreement contains a provision stating that the parties will attempt in good faith to mutually devise and implement a means to extend the unbundled loop sufficient to enable DeltaCom to use a collocation arrangement at one BellSouth location per LATA (e.g. Tandem Switch) to obtain access to unbundled loops at another BellSouth location over BellSouth facilities. BellSouth/DeltaCom Interconnection Agreement Article IV.B14.

DeltaCom points out that several other state commissions have made it clear that extended loops, or extended links (EELs) must be provided to CLECs. The California Public Utilities Commission has required Pacific Bell to demonstrate that it has made the extended link UNE available to CLECs. Pennsylvania has required Bell Atlantic to provide the UNE-P and the EEL except where it proves by a preponderance of the evidence that collocation is a more reasonable economical alternative to the provision of the EEL. The states of Texas and New York have also ensured that EELs are made available to CLECs. The Georgia Commission has also required that BellSouth provide the EEL to CLECs.

DeltaCom referred to a Georgia Commission order in ICG arbitration GPSC Docket No. 10767-U, February 11, 2000, in which that Commission ordered BellSouth to provide the extended loop to ICG. That order followed a Georgia Commission decision in GPSC Docket No. 10692-U on generic UNE combinations which required BellSouth to make available to CLECs any combination of facilities which is routinely or ordinarily combined in BellSouth's network. We note that the Georgia Commission's arbitration decision interpreted FCC Rule 315(b) to apply to elements that the incumbent currently combines not merely elements that are currently combined. The Georgia Commission cited both the FCC Order and the Ninth Circuit's

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3 *In the Matter of Local Competition Provisions in the Telecommunications Act of 1996* Docket No. 96-98 (August 8, 1996)

decision. In the order in the generic proceeding the Georgia Commission referred to the US Supreme Court Decision in *AT&T Corporation v. Iowa Utilities Board*, 119 S Ct. 721 (1999) This matter came before the U.S. Supreme Court on writs of certiorari from the decision of the Eight Circuit Court of Appeals, which had vacated portions of the Federal Communications Commission's First Report and Order on August 8, 1996. Among other things the Eighth Circuit had vacated FCC Rule 315(b) which prohibited ILECs from separating elements that are already combined. FCC Rule 315 addressed combinations of unbundled network elements. The Supreme Court reversed the Eighth Circuit on this issue, reinstating Rule 315(b).

The Georgia Commission stated that the U.S. Supreme Court did not reinstate FCC rule 315(b) only to the extent it prohibited incumbents from ripping apart elements currently physically connected to each other but reinstated the rule in its entirety and did so based on its interpretation of the nondiscrimination language of Section 251(c)(3). (FCC Third Report and Order). The Georgia Commission further stated that the Ninth Circuit recently ruled that it necessarily follows from the Supreme Court decisions that "requiring the ILEC to combine unbundled network elements is not inconsistent with the Act ... the Act does not say or imply that network elements may only be leased in discrete parts." *U.S. West Communications v. MFS Intelenet, Inc*, 1999WL799082, *7(9TH Cir. Oct. 9, 1999).

The Ninth Circuit found that the Eighth circuit erred when the Eighth Circuit concluded that the paragraph 51.315(c)-(f) was invalid, because it was inconsistent with the Act.

The BellSouth Position

BellSouth contends that the negotiations regarding the provision to extend the unbundled loop in the existing agreement never took place and DeltaCom simply began ordering special access and unbundled loops terminated to the special access facility. BellSouth stated that it made an error in completing these orders. Further BellSouth contends that the FCC Third Report and Order in CC Docket 96-98 (Nov. 5, 1999) as modified by the FCC's Supplemental Order issued on November 24, 1999, resolved the issue when the FCC confirmed that BellSouth presently has no obligation to combine elements for CLECs such as DeltaCom when those elements are not currently combined in BellSouth's network. BellSouth states that the Eighth Circuit Court of Appeals vacated FCC Rule 51.315(c)-(f) which required incumbents to combine network elements. BellSouth contends that this rule has not been appealed to or reinstated by the U. S. Supreme Court. In its Third Report and Order the FCC declined to revisit this rule because the matter was on appeal to the Eighth Circuit Court.

BellSouth also points out that this Commission ruled in the ICG arbitration that BellSouth was only required to provide the Enhanced Extended Loop (EEL) when it is currently combined. Thus, this Commission took the view that BellSouth was not required to provide the EEL anywhere in its network but only where it is currently combined. BellSouth points out that the FCC Third Report and Order places constraints on the conversion of special access to unbundled network elements. The FCC made clear that carriers may not convert special access services to combinations of unbundled network elements unless the carrier uses combinations of network elements to provide a significant amount of local exchange service in addition to exchange access service to a particular customer.

BellSouth stated in its brief that the parties will continue to operate under the existing agreement until a new agreement is in effect. BellSouth argues that DeltaCom has chosen the wrong forum to litigate its rights under the expired agreement for the Enhanced Extended Link or extended loops and that the proper remedy is for DeltaCom to file a complaint with this Commission. BellSouth admits that it provided channelized special access (a tariffed service) and unbundled loops that were terminated to the special access facility. However, BellSouth argues that these were provided in error. Tr. 823-824.

On cross-examination by Mr. Adelman, BellSouth's witness, Varner stated that BellSouth could choose to provide special access transport with a UNE loop if it so desires. However, according to Varner there are no requirements for BellSouth to provide this combination of services (Tr. 903-913)

On cross-examination by Mr. Ross, DeltaCom's witness, Hyde stated that DeltaCom had to buy collocations or face disconnection of customers who are being served via the extended loop. (Tr. 680)

BellSouth asserts that it reached an oral agreement with DeltaCom in April 1999 in which BellSouth would continue provisioning extended loops to DeltaCom until such time as DeltaCom could establish collocation arrangements in the affected central offices. BellSouth is currently provisioning DeltaCom collocation orders. When these collocation arrangements are completed, BellSouth intends to curtail the provisioning of the "extended loops" and convert these to unbundled loops and unbundled dedicated transport delivered to DeltaCom's collocation space allowing DeltaCom to combine these elements in order to provide telecommunications service. Tr. 824.

Discussion of Issue 2(b)(ii)(iii)

In its Third Report and Order the FCC stated that it was declining to address this argument at this time because the matter was pending before the Eighth Circuit. The Georgia Commission concluded that the only FCC interpretation of "currently combines" remains the literal one contained in the First Report and Order. Thus, the Georgia Commission found that "currently combines" means ordinarily combined within the BellSouth network, in the manner which they are typically combined.

In the ICG arbitration order, Docket No. 10767-U, the Georgia Commission found that ICG could purchase combinations of UNEs that BellSouth ordinarily combines in its network. If the Georgia Commission has not specifically priced such combinations, ICG could purchase such UNE combinations at the sum of the stand-alone prices of the UNEs, which make up the combination. The Georgia Commission stated that if ICG is dissatisfied with those prices, ICG could use the bona fide request process to seek a different rate. The Georgia Commission specifically set the EEL price in Docket No. 10767-U at the rate set in its generic proceeding to establish long term rates for unbundled network elements, Docket No. 10692-U. See GPSC Docket No. 10767-U, page 7 of 11.

The Georgia Commission went further to state that ICG could self-certify that they are providing a significant amount of local exchange service over combinations of unbundled loops and transport network elements in order to convert special access facilities to UNE pricing.

Thus, BellSouth could file a complaint with that Commission if they felt that ICG is not providing a significant amount of local exchange traffic over the facilities.

In the ICG arbitration (Docket 27069) the Alabama Commission concluded that BellSouth must provide the EEL in situations where the elements of the EEL are currently combined in the BellSouth network. According to the Alabama Commission, BellSouth does not have to provide the EEL in situations where the EEL is not already combined in its network.

We agree with the findings of the Georgia Commission that BellSouth should be required to provide the EEL anywhere in its network if BellSouth currently provides the EEL anywhere within its network. We believe that the interpretation to provide the EEL only where the EEL is currently combined unduly restricts competition. As noted below, the FCC recently acted to restrict the use of EELs in CC Docket 96-98, FCC 00-183.

We agree with the Ninth Circuit ruling that it necessarily follows that requiring the ILEC to combine unbundled network elements is not inconsistent with the Act. The Act does not say or imply that network elements may only be leased in discrete parts. *U.S. West Communications v. MFS Intelenet, Inc.*, 1999WL799082, *7(9TH Cir. Oct. 9, 1999). In *MCI vs. U.S. West* (9835819), the Ninth Circuit Court of Appeals concluded that a provision requiring combination of elements does not violate the Telecommunications Act of 1996. The Ninth Circuit stated that the U.S. Supreme Court's interpretation of the Act makes it clear that a provision requiring combinations does not violate the Act.

The FCC recently ruled in CC Docket 96-98, FCC 00-183, Supplemental Ruling Clarification, adopted May 19, 2000, that a requesting carrier is providing a significant amount of local exchange service to a particular customer if it meets one of the following three circumstances:

> 1) The requesting carrier certifies that it is the exclusive provider of an end user's local exchange service. The loop-transport combinations must terminate at the requesting carrier's collocation arrangement in at least one incumbent LEC central office. This option does not allow loop-transport combinations to be connected to the incumbent LEC's tariffed services. Under this option, the requesting carrier is the end user's only local service provider, and thus is providing more than a significant amount of local exchange service. The carrier can then use the loop-transport combinations that serve the end user to carry any type of traffic, including using them to carry 100 percent interstate access traffic; or
>
> 2) The requesting carrier certifies that it provides local exchange and exchange access service to the end user customer's premises and handles at least one-third of the end user customer's local traffic measured as a percent of total end user customer local dialtone lines; for DS1 circuits and above, at least 50 percent of the activated channels on the loop portion of the loop-transport combination have at least 5 percent local voice traffic individually, and the entire loop facility has at least 10 percent local voice traffic. When a loop-transport combination includes multiplexing each of the individual DS1 circuits must meet these criteria. The loop-transport combination must terminate at the requesting carrier's collocation arrangement in at least one incumbent LEC central office. This option does not allow loop-transport combinations to be connected to the incumbent LEC's tariffed services; or
>
> 3) The requesting carrier certifies that at least 50 percent of the activated channels on a circuit are used to provide originating and terminating local dialtone service and at least 50 percent of the traffic on each of these local dialtone channels is local voice traffic, and the entire loop facility has at least

> 33 percent local voice traffic. When a loop-transport combination includes multiplexing, each of the individual DS1 circuits must meet these criteria. This option does not allow loop-transport combinations to be connected to the incumbent LEC's tariffed services. Under this option, collocation is required.

This new FCC ruling would seem to preclude DeltaCom from utilizing its current arrangement to provide service since DeltaCom is utilizing the loop-transport combination with a tariffed service. Based upon the language of the Ninth Circuit, we believe that BellSouth should be required to provide the EEL to DeltaCom if BellSouth currently combines the EEL anywhere in its network. However, based upon the recent Eighth Circuit's decision regarding Rule 315(c)-(f), we recommend that the Commission require BellSouth to provide the EEL where it is already combined within the BellSouth network.

Conclusion on Issue 2(b)(ii)(iii)

BellSouth should allow these extended loops to continue until such time that DeltaCom's collocation arrangements can be installed. When these collocation arrangements are completed, BellSouth should convert these to unbundled loops and unbundled dedicated transport delivered to DeltaCom's collocation spaces allowing DeltaCom to combine these elements. add to Att 2.

also go back & add to SC & NC.

If the parties can agree upon other lawful alternatives, they are free to negotiate the terms and conditions of such alternatives.

The Findings and Conclusions of the Commission as to Issue No. 2(b)(ii)(iii)

The Commissions concurs with the findings and conclusions of the Arbitration Panel concerning this issue. We accordingly adopt the findings and conclusions of the Arbitration Panel in that regard as our own. We concur with the Arbitration Panel's finding that BellSouth must provide the EEL where it is already combined within the BellSouth network. Additionally, BellSouth shall allow DeltaCom to continue the current extended loop arrangements until such time that DeltaCom's collocation arrangements can be installed. At that time BellSouth shall convert the existing arrangements to unbundled loops and unbundled dedicated transport delivered to DeltaCom's collocation space allowing DeltaCom to combine these elements.

IT IS SO ORDERED BY THE COMMISSION

Issue 3 - Reciprocal Compensation (Att. 3 - 6.0; GTC - definition of local and reciprocal compensation)

Should BellSouth be required to pay reciprocal compensation to ITC^DeltaCom for all calls that are properly routed over local trunks, including calls to Information Service Providers (ISPs)?

The ITC^DeltaCom Position

DeltaCom argues that it cannot be disputed that when a BellSouth customer places or originates a call and uses the DeltaCom network to complete that call, DeltaCom incurs costs. When the call is completed to any residential or business customer, BellSouth has agreed to pay compensation as required by the Act to DeltaCom. However, if the customer on the other end of that call happens to be an ISP, BellSouth asserts no compensation is due to DeltaCom.

DeltaCom argues that BellSouth's proposal for reciprocal compensation discriminates in three ways: (1) it denies DeltaCom the ability to recover its costs of terminating local calls for Bellsouth; (2) it grants BellSouth free access to DeltaCom's network when sending ISP calls to the company without reciprocating with an offer of equal value; and 3) it requires DeltaCom to subsidize BellSouth's profit margins and shareholders by providing below-cost service. Tr. 145

DeltaCom believes that the concept of calling party pays should apply to reciprocal compensation Tr. 162. The company of the customer responsible for the originating call should be responsible for the costs associated with that call. This applies both to local and long distance calls. The originating party pays for calls terminated to a different carrier. Tr.161-163. According to DeltaCom, this should apply to calls to an ISP, as well all other calls.

DeltaCom's witness, Mr. Rozycki, in his rebuttal testimony stated that the FCC's *Declaratory Ruling* provides that states may determine the appropriate mechanism for reciprocal compensation until the FCC issues its final rulemaking. The FCC stated further that "the mere fact that ISP-bound traffic is largely interstate does not necessarily remove it from the Section 251/252 negotiations and arbitration process." He asserts that the FCC went on to declare that "While to date the Commission has not adopted a specific rule governing the matter, we note that our policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that such compensation is due for that traffic." Tr. 177-180.

DeltaCom further asserted that ISPs are not carriers as BellSouth claims and that the Eighth Circuit Court recognized this fact when it affirmed the FCC's decision in its order on Access Charge Reform[4] to refrain from imposing access charges on ISPs. The FCC treats ESP/ISPs as end users. DeltaCom argues that the fact that ISPs are not carriers, but are treated as end users, and are exempt from access charges is one of the most compelling reasons for imposing reciprocal compensation requirements on ISP-bound traffic. Tr. 177-183

DeltaCom stated that it provides its ISP customers service in the form of local lines just as BellSouth does for its ISP customers. DeltaCom indicated that its ISP service offerings are not priced to recover the cost of transport and switching of incoming traffic from BellSouth, nor should they be. Rozycki Tr. Pp.177-185

The BellSouth Position

Alphonso Varner and Dr. William E. Taylor testifying for BellSouth, argue that ISP-bound traffic is not subject to reciprocal compensation. Mr. Varner further stated that payment of reciprocal compensation for ISP-bound traffic is inconsistent with the law and is not sound public policy. Tr. 780. BellSouth argues that the FCC established jurisdiction over ISP traffic in the FCC's *Declaratory Ruling*, and that it is fruitless for state commissions to deal with this issue at this time. BellSouth states that although it seems that the FCC appears to give states authority to create an interim compensation arrangement until the FCC established rules, the

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4 *In the Matter of Access Charge Reform*, First Report and Order, CC Docket No. 96-262 et.al., FCC 97-158.345.348 (May 16, 1997)

FCC's authority to confer this ability on the states is being challenged in court. (Tr.780) BellSouth argues that as confirmed by the FCC's Declaratory Ruling, ISP-bound traffic is jurisdictionally interstate; therefore, reciprocal compensation for ISP-bound traffic under Section 251 is not applicable. Consequently, compensation for such traffic is not subject to arbitration under Section 252.

Mr. Varner recommended that BellSouth and DeltaCom track ISP-bound traffic originating on each party's respective network on a going forward basis. Each party should then agree to abide by the FCC's final and non-appealable ruling on this issue. Any inter-carrier compensation mechanism established by the FCC would apply retroactively from the date of the interconnection agreement and the parties would true up any compensation that may be due for ISP-bound traffic. Tr. 781-782.

BellSouth argues that the Act and the FCC's First Report and Order in Docket 96-98 support the position that reciprocal compensation does not apply to ISP-bound traffic. BellSouth states that the Act's interconnection requirements promulgated at 47 U.S.C.§251(b)(5) require all local exchange carriers "to establish reciprocal compensation arrangements for the transport and termination of telecommunications." The reciprocal compensation duty arises, however, only in the case of local calls. BellSouth argues that in its August 1996 Local Interconnection Order (CC Docket No. 96-98), paragraph 1034, the FCC made it perfectly clear that reciprocal compensation rules do not apply to interstate or interLATA traffic such as interexchange traffic. Tr. 783

BellSouth argues that the FCC's Declaratory Ruling confirms that ISP-bound traffic is subject to interstate jurisdiction and is not local traffic. The FCC noted in its decision that it traditionally has determined the jurisdiction of calls by the end-to-end nature of the call. Tr. 784

Mr. Varner argues that ISPs are carriers and thus the service provided to them is access service. He stated that this fact eliminates any possible claim for reciprocal compensation. The FCC has been very clear in its ruling that reciprocal compensation does not apply on access services. Tr. 787. BellSouth argues that the fact that ISPs are carriers is very important because carriers must pay the full costs of the service provided to them. Varner elaborated that the declaration of ISP traffic as interstate does not alter the current ISP exemption from access charges. ISPs continue to be permitted to access the public switched telecommunications network by paying basic business local exchange rates rather than paying interstate switched access tariff rates. Tr.789. To pay reciprocal compensation on ISP-bound traffic would be perversion of the entire access charge system according to Varner. Tr. 793.

On rebuttal Varner argued that this Commission is not required to take any action regarding reciprocal compensation pending adoption of the FCC's inter-carrier compensation rules. Tr. 827. BellSouth again suggested that the parties track the ISP bound traffic and true-up when the FCC issues a final non-appealable ruling. Varner also suggested that the parties could provide for an inter-carrier revenue sharing compensation arrangement for ISP-bound traffic based upon the apportionment of revenues collected for the access service among carriers incurring costs to provide service. Varner's third alternative was to implement a bill and keep arrangement for ISP-bound traffic. Tr. 827-828.

Discussion of Issue 3(1)

Both parties frequently referenced the FCC's *Declaratory Ruling* in their arguments in support of their positions on the issue of reciprocal compensation for ISP-bound traffic. However, since the record in this proceeding was compiled, the decision of the United States Court of Appeals for the D.C. Circuit *in Bell Atlantic Telephone Companies v Federal Communications Commission*[5] issued a decision vacating the FCC's *Declaratory Ruling* regarding inter carrier compensation for ISP-bound traffic. The Court determined in said ruling:

> The end-to-end analysis applied by the Commission here is one that it has traditionally used to determine whether a call is within its interstate *jurisdiction*. Here it used the analysis for quite a different purpose, without explaining why such an extension made sense in terms of the statute or the Commission's own regulations. Because of this gap, we vacate the ruling and remand the case for want of reasoned decision-making.[6]

The Court stated further:

> Because the Commission has not provided a satisfactory explanation why LECs that terminate calls to ISPs are not properly seen as "terminat[ing] ... local telecommunications traffic," and why such traffic is "exchange access" rather than "telephone exchange service," we vacate the ruling and remand the case to the Commission. We do not reach the objections of the incumbent LECs that §251(b)(5) preempts state commission authority to compel payments to the competitor LECs; at present we have adequately explained classification of these communications, and in the interim our vacatur of the Commission's ruling leaves the incumbents free to seek relief from state-authorized compensation that they believe to be wrongfully imposed.[7]

In Response to the Courts remand, on June 23, 2000, the FCC issued a Public Notice in CC Docket Nos. 96-98, 99-68 seeking comments on the issues identified by the court in its decision. The FCC in particular asked parties to comment on the jurisdictional nature of ISP-bound traffic, the scope of the reciprocal compensation requirement of Section 251(b)(5), and on the relevance of the concepts of "termination," "telephone exchange service," "exchange access service," and "information access."

Many of the arguments raised during this arbitration concerning reciprocal compensation for ISP-bound traffic were also raised before this Commission in Docket Nos. 26619 and 27063. In both instances, the Commission found the arguments raised by BellSouth to be without merit. The Commission's conclusion in that regard in Docket 26619 was affirmed by the United States District Court for the Middle District of Alabama in *BellSouth Telecommunications v. ITC^DeltaCom Comm.* No. 99-D-287-N, aa-D-747-N (M.D. Ala. Nov.15, 1999).

The panel recognizes the critical importance of reciprocal compensation for ISP-bound traffic to both parties. The issue is also of critical importance to this Commission, given its potential importance to the development of competition in this state. As previously held by

5 *Bell Atlantic Telephone Companies v. Federal Communications Commission,* No. 99-1094 (DC Cir., March 24, 2000 (hereinafter *Court Decision*)

6 Id. *Court Decision* pg. 3

7 *Id Court Decision* pg. 10

the Commission in Dockets 26619 and 27069[8] we find herein that the Commission has jurisdiction concerning the issue of reciprocal compensation for ISP-bound traffic and that such traffic is subject to reciprocal compensation.

The action by the DC Circuit Court vacating the FCC's *Declaratory Ruling* does not affect the Commission's authority to determine the issue of reciprocal compensation for ISP-bound traffic. BellSouth witness, Varner, improperly concludes that state commissions do not have authority to address reciprocal compensation for ISP-bound calls in 47 U.S.C. §252 arbitration proceedings since that section of the Act only gives state commissions jurisdiction over areas within the scope of 47 U.S.C. §251. What BellSouth fails to acknowledge is that the FCC found in the *Local Competition Order*[9] that state commissions authority over interconnection agreements pursuant to §252 of the 1996 Act extends to both interstate and intrastate matters. Contrary to BellSouth's conclusions, the FCC has held that §§251, 252, 253 of the 1996 Act afford state commissions substantial authority to regulate not only intrastate services but interstate services as well[10]. The FCC's jurisdictional analysis set forth above was upheld by the United States Supreme Court in *AT&T Corp. v. Iowa Utils Bd.* 119 S. Ct. 721 (1999).

BellSouth further fails to acknowledge Section 252(b)(4)(C) of the Act. Said provision requires that the state commission in an arbitration "shall resolve each issue set forth in the petition and the responses, if any, by imposing appropriate conditions as required to implement subsection (c) upon the parties to the agreement and shall conclude the resolution of any unresolved issues..."

We note that since the passage of the 1996 Act, the FCC has continued, as it did in the past, to discharge its interstate regulatory obligations regarding ISP-bound traffic by treating that traffic as though it is local. The FCC also continued its 1983 policy of exempting ESP/ISP-bound traffic from the imposition of access charges in the Access Charge Reform proceeding.[11] Additionally, the FCC maintains the requirement that LECs book and treat ISP services as local traffic for jurisdictional separation purposes.

We also note that some twenty-four (24) other state commissions have addressed the issue of whether reciprocal compensation should apply to ISP-bound traffic. Of those twenty-four (24) state commissions that have rendered decisions on the merits of the applicability of reciprocal compensation to ISP-bound traffic, twenty-three (23) have upheld the application of reciprocal compensation to such traffic[12]. Three additional states have decided to

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8 *In RE: Emergency Petitions of ICG Telecom Group Inc. and ITC DeltaCom Communications, Inc. for a Declaratory Ruling* (Alabama Public Service Commission, March 4, 19990

In the Matter of: Petition by ICG Telecom Group, Inc. For Arbitration of the Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996 (Alabama Public Service Commission November 10, 1999)

9 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (Local Competition Order) CC Docket 96-98, First Report and Order

10 Id ¶83

11 Id

12 See Appendix A attached hereto.

withhold the issuance of a final ruling concerning inter-carrier compensation for ISP-bound traffic until the FCC further addresses the issue[13].

In addition to the aforementioned state commissions, all five of the federal courts that have issued decisions addressing appeals of state commission decisions requiring reciprocal compensation for ISP-bound traffic after the release of the FCC's *ISP Declaratory Ruling* have upheld the determinations of the applicable state commissions. The five courts include the United States Court of Appeals for the Seventh Circuit, the United States Court of Appeals for the Fifth Circuit, and three district courts, including the Federal District Court for the Middle District of Alabama[14].

The opinion of the Seventh Circuit upholding a decision of the Illinois Commerce Commission which required the payment of reciprocal compensation for ISP-bound traffic pursuant to existing interconnection agreements is particularly enlightening. Specifically, the Seventh Circuit Court stated that "[The] FCC could not have made clearer its willingness--at least until the time a [FCC] rule is promulgated--to let state commissions make the call. We see no violation of the Act in giving such deference to state commissions; in fact the Act specifically provides state commissions with an important role to play in the field of interconnection agreements".[15]

It is apparent that the FCC envisioned state action concerning the applicability of inter-carrier compensation for ISP-bound traffic in such arbitrations pending the promulgation of a federal rule and even thereafter. In fact, the FCC specifically noted at ¶30 of the *ISP Declaratory Ruling* the following:

> We tentatively conclude that, as a matter of federal policy, the inter-carrier compensation for this interstate telecommunications traffic should be governed prospectively by interconnection agreements negotiated and arbitrated under Sections 251 and 252 of the Act. Resolution of failures to reach agreement on inter-carrier compensation for interstate ISP-bound traffic then would occur through arbitrations conducted by state commissions, which are appealable to federal district courts.

The FCC clearly indicates its intention to have state commissions arbitrate the issue of reciprocal compensation for ISP-bound traffic. We do not believe the FCC's "intention" is affected by the Court's vacating of the *Declaratory Ruling* on independent grounds.

Having determined that the Commission has the appropriate jurisdiction to address the issue of inter-carrier compensation of ISP-bound traffic and that such compensation be paid in the form of reciprocal compensation, our analysis now turns to an assessment of whether it is prudent to exercise that jurisdiction. BellSouth urges that since the FCC'S *ISP Declaratory Ruling* is currently subject to a court challenge (and has now in fact been vacated), states could find that they do not have the authority to create even an interim compensation arrangement. BellSouth further asserts that even if the states do have the authority, such authority is valid only until the FCC completes its rulemaking on the subject. Therefore, any effort devoted by this Commission to establishing interim compensation arrangements for ISP-

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[13] See Appendix B attached hereto.
[14] See appendix C attached hereto.
[15] *Illinois Bell* at p. 574.

bound traffic would likely be wasted effort. For the reasons set forth in more detail below, we reject BellSouth's arguments in favor of inaction.

As we stated previously, the DC Circuit Court has issued its ruling vacating the FCC's *ISP Declaratory Ruling* order. Nonetheless, one of the major factors which dictates immediate action on the issue of inter-carrier compensation for ISP-bound traffic is the fact that the FCC has initially indicated that any federal rule governing that issue which is ultimately promulgated in the future, will have prospective application only.[16] It is unlikely that the FCC's previous decision in that regard will change. It, therefore, appears that if the Commission does not take action to require compensation for calls to ISPs, DeltaCom may never be compensated for the calls it delivers to ISPs during the interim period between the approval of an interconnection agreement between DeltaCom and BellSouth and the time the FCC addresses the Court's remand of it's *Declaratory Ruling* and adopts a federal rule governing the subject. As BellSouth witness Taylor opined,

> Even though the FCC recently declared ISP-bound traffic is at best, jurisdictionally mixed and is, in most instances interstate, no rulemaking has yet occurred to establish such charges for ISPs. There remains considerable uncertainty as to when rules to this effect will be established. Taylor Tr. 951

This problem will only be exacerbated if the FCC does not act quickly to answer the court's remand and reach a final, legally acceptable determination of how ISP-bound traffic should be addressed and compensated for in the move to local competition.

In light of the concerns set forth immediately above, we do not find merit in BellSouth's fall-back proposition that the parties simply track ISP-bound traffic until such time as the FCC promulgates its federal rule and apply any compensation mechanism adopted by the FCC retroactively.[17] It is undeniable that DeltaCom will incur costs in terminating traffic to its ISP customers, which originates from BellSouth customers. It would be entirely inconsistent with the competitive principles underlying the Act not to provide DeltaCom with some mechanism to recover those costs as they are incurred. The immediate need for such a mechanism is only heightened given the delay, which may well transpire before a federal rule is finally promulgated by the FCC for prospective application. The Commission's failure to implement such a mechanism in the interconnection agreement between DeltaCom and BellSouth at this juncture would likely preclude DeltaCom from competing for ISP customers and ultimately from competing for other types of customers as well.

Having determined that the Commission has the jurisdiction to establish inter-carrier compensation for ISP-bound traffic (including reciprocal compensation) and that said jurisdiction should be exercised in this arbitration proceeding, the question now becomes what type of inter-carrier compensation is most appropriate for ISP-bound traffic. Our analysis of that inquiry looks at the concept of cost recovery. More particularly, our analysis centers on a determination of the costs DeltaCom incurs in terminating traffic that is originated on BellSouth's network and terminates to ISP end user customers of DeltaCom, as well as the recovery of those costs.

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16 FCC's *ISP Declaratory Ruling* at &28.

17 BellSouth asserts that the Commission should require such an approach only if it finds that it has jurisdiction to implement an inter-carrier compensation mechanism and that such a mechanism is warranted.

DeltaCom asserts it uses exactly the same type of facilities to deliver calls to ISPs as with any other call. The costs it incurs in delivering a call bound for an ISP customer do not differ from those generated by calls bound for other types of DeltaCom customers. Regardless of the jurisdictional nature of the traffic, DeltaCom asserts that compensation must still be paid when a carrier terminates the calls of another carrier's customer. Not applying reciprocal compensation to ISP-bound traffic would afford BellSouth free use of DeltaCom's network when BellSouth's customers place calls to DeltaCom's ISP customers.

DeltaCom further argues that reciprocal compensation for ISP-bound traffic is the appropriate and legal mechanism to compensate a local exchange company for delivering ISP-bound. DeltaCom contends that Mr. Varner provides the precise rationale supporting this policy when he states that BellSouth believes that carriers are entitled to be compensated appropriately based on the use of their network to transport and deliver traffic" Tr. 177. DeltaCom asserts that reciprocal compensation imposes the costs of delivering traffic on the cost causer--the carrier whose subscriber initiates the call.

BellSouth counters the DeltaCom arguments in favor of reciprocal compensation as an appropriate inter-carrier compensation mechanism with a strained claim that the Commission should not require reciprocal compensation for ISP-bound traffic because such traffic is interstate "access" traffic for which reciprocal compensation does not apply.

The premise of BellSouth's "access" traffic argument is that ISP-bound traffic should be treated as "access" traffic for which the revenues generated must be shared between the local exchange carriers involved in originating and terminating the traffic. Under BellSouth's proposal, the LEC serving-and therefore billing-the ISP would treat the ISP's payments for business services purchased out of the serving carriers local exchange tariff as "access" revenue and share it with the other carrier.

In evaluating the appropriateness of requiring reciprocal compensation as the appropriate inter-carrier compensation mechanism for ISP-bound traffic in this proceeding, we find BellSouth "access" traffic arguments to be misplaced and totally contrary to prevailing regulatory mandates. The FCC has repeatedly emphasized that it has since 1983 treated ISP-bound traffic as though it were local and continues to do so. Although vacated on independent grounds, the FCC's *ISP Declaratory Ruling* was in fact replete with references to this continued practice:

> Although the Commission has recognized that enhanced service providers (ESPs), including ISPs, use interstate access services, since 1983 it has exempted ESPs from the payment of certain interstate access charges. Pursuant to this exemption, ESPs are treated as end users for purposes of assessing access charges, and the Commission permits ESPs to purchase their links to the public switched telephone network (PSTN) through intrastate business tariffs rather than through interstate access tariffs. Thus, ESPs generally pay local business rates and interstate subscriber line charges for their switched access connections to the local exchange company's central offices. In addition, incumbent LEC expenses and revenues associated with ISP-bound traffic traditionally have been characterized as intrastate for separations purposes. ESPs also pay the special access surcharge when purchasing special access lines under the same conditions as those applicable to end users. In the *Access Charge Reform Order*, the Commission decided to maintain the existing price and structure pursuant to which ESPs are treated as end users for the purpose

of applying access charges. Thus, the Commission continues to discharge its interstate regulatory obligations by treating ISP-bound traffic as though it were local. *Id.* at ¶5.

* * *

As explained above, under the ESP exemption LECs may not impose access charges on ISPs; therefore, there are no access revenues for interconnecting carriers to share. Moreover, the Commission has directed states to treat ISP traffic as if it were local by permitting ISPs to purchase their PSTN links through local business tariffs. *Id.* at ¶9.

* * *

Our determination that at least a substantial portion of dial-up ISP-bound traffic is interstate does not, however, alter the current ESP exemption. ESPs, including ISPs, continue to be entitled to purchase their PSTN links through intrastate (local) tariffs rather than through interstate access tariffs. *Id.* at ¶20.

* * *

The Commission's treatment of ESP traffic dates from 1983 when the Commission first adopted a different access regime for ESPs. Since then, the Commission has maintained the ESP exemption pursuant to which it treats ESPs as end users under the access charge regime and permits them to purchase their links to the PSTN through intrastate local business tariffs rather than through interstate access tariffs. As such, the Commission discharged its interstate regulatory obligations through the application of local business tariffs. Thus, although recognizing that it was interstate access, the Commission has treated ISP-bound traffic as though it was local. In addition, incumbent LECs have characterized expenses and revenues associated with ISP-bound traffic as intrastate for separations purposes. *Id.* at ¶23.

It is abundantly clear from the above references that ISPs purchase monthly local exchange service much like any other local exchange customer. As local exchange customers, ISPs do not pay access charges and neither DeltaCom nor BellSouth can force ISPs to pay switched access charges for access to their networks. Thus, there are no access revenues for interconnecting carriers to share[18]. Clearly, ISP-bound traffic is not subject to an access charge regulatory framework but rather is treated as local exchange traffic for regulatory purposes.

Having rejected BellSouth's "access" traffic arguments, we find merit in DeltaCom's arguments regarding the similarities between local exchange traffic and ISP-bound traffic. In fact, we are persuaded that calls over local exchange carrier (LEC) facilities to ISPs appear functionally equivalent to local voice calls, which are subject to reciprocal compensation. Since the same network facilities and functions are utilized to complete both types of calls, it is axiomatic that the costs to deliver them are identical. We find that those identical costs dictate that the rates associated with recovering those costs should also be identical. We accordingly find that reciprocal compensation should apply to ISP-bound traffic just as it does to local voice traffic.

18 FCC's *ISP Declaratory Ruling* at &9.

Conclusion to Issue 3(1)

Based on the foregoing discussion, the Arbitration Panel concludes that dial-up calls to ISPs should be subject to reciprocal compensation. The Arbitration Panel specifically rejects the BellSouth position that the parties track ISP traffic, pending the establishment of a federal rule and retroactively apply any mechanism ultimately adopted by the FCC to such traffic.

The Findings and Conclusions of the Commission as to Issue 3(1)

We concur with the Arbitration Panel's conclusion that dial-up calls to ISPs should be subject to reciprocal compensation. We further concur with the reasoning relied upon by the Arbitration Panel in reaching this recommendation. In our prior decision in Docket 27069, the Commission determined that the public interest would be best served by requiring that the interim inter-carrier compensation required in that docket be subject to a "true-up" once the FCC issued its final federal rule governing inter-carrier compensation for ISP-bound calls and said rules became effective. Since we issued that order, two recent court decisions[19] raise concerns that cause us to revisit our determination in that case. The decisions of the DC Circuit Court and the Eighth Circuit Court created a high level of uncertainty as to when and if the FCC will issued federal rules governing inter-carrier compensation. The uncertainty surrounding the promulgation of federal rules creates a void in determining a basis for any "true-up". We, therefore, believe that a generic proceeding by this Commission on the issue of reciprocal compensation will provide a more viable and timely resolution of the issues, and be in the best interest of all parties. More specifically, we adopt the motion of Commissioner Wallace that the Commission establish a generic docket addressing reciprocal compensation and that the compensation herein ordered for ISP-bound traffic be retroactively "trued-up" to the level of inter-carrier compensation ultimately adopted by the Commission in its generic docket on reciprocal compensation.

In order to prepare for the eventuality of a "true-up" of the interim inter-carrier compensation ordered herein for ISP-bound traffic, we hereby instruct the parties to track all ISP-bound calls and their duration effective immediately upon the approval and implementation of the interconnection agreement which will result from this Arbitration. Once the Commission issues a ruling governing inter-carrier compensation for ISP bound traffic and said ruling becomes effective, that rule will prospectively govern the compensation to be paid by the parties to this proceeding for ISP-bound traffic. Similarly, the compensation ordered to be paid in this proceeding for ISP-bound traffic will be retroactively "trued-up" to the Commission's determined mechanism from the effective date of the interconnection agreement that results from this Arbitration. If through that retroactive "true-up" process any funds are found to be owing by one party to the other, the party owing such funds shall submit them to the opposite party within thirty (30) days of the completion of the "true-up" process.

IT IS SO ORDERED BY THE COMMISSION.

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19 *Bell Atlantic Telephone Companies v. Federal Communications Commission*, No. 99-1094 (DC Cir., March 24, 2000); Eighth Circuit Court Decision in response to the Supreme Court Remand in *Iowa Utilities Board, et.al. v FCC*, (July 18, 2000)

Issue 3 – (2) Reciprocal Compensation Rates (Att. 3 - 6.0)

What should be the rate for reciprocal compensation per minute of use, and how should it be applied?

The ITC^DeltaCom Position

DeltaCom stated that it had proposed continuing the current .009 reciprocal compensation rate in its existing interconnection agreement while BellSouth has proposed elemental billing based on the state ordered rates for local transport, end office switching, and tandem switching. Additionally, DeltaCom asserts that BellSouth proposes a different computation for DeltaCom's transport rate, which would have it charge less than its costs for terminating BellSouth originated local calls. DeltaCom argues that BellSouth's pricing scheme discriminates against the company and its customers. DeltaCom argues that BellSouth's proposal would have DeltaCom charge a proxy rate based on the way BellSouth's network is configured, not based on DeltaCom actual transport. DeltaCom argues that just as BellSouth charges for each and every component in its network that DeltaCom uses, so should DeltaCom be able to charge BellSouth. TR. 146-147.

DeltaCom asserts that a better way to handle the imbalances in costs and revenue flows would be to negotiate a single rate crafted to insure that neither party is disadvantaged with respect to the other. DeltaCom believes that rate should be set at S0.0045 for the two-year term of this contract. Then the rate should be reduced by S0.0005 per year until it reaches BellSouth's TELRIC-based rates for transport and switching. DeltaCom argues that the rate of S0.0045 is proper even though BellSouth's TELRIC costs are lower; because a number of economic factors give DeltaCom a much higher cost structure than that faced by BellSouth. DeltaCom argues, since the costs faced by each firm are so different, it is appropriate to compromise on a middle ground for the mutual exchange of traffic. Tr.160-161

Mr. Rozycki explained that the BellSouth's proposed rate is not symmetrical, because DeltaCom has designed a network where its switches perform the same functions as the BellSouth end office and tandem switches.

DeltaCom indicated that BellSouth refused to pay it for the tandem switching element of local access, because DeltaCom had no tandem switches. However, DeltaCom's switch performed the same functionally equivalent services as BellSouth's switching configuration (Tr. 157). In other words DeltaCom's switches provide similar functions to those performed by BellSouth's tandem switches. DeltaCom's switches perform the same tandem and end office switching function in one switch.

DeltaCom argues that FCC Rule 51.711(a) (3) states that where a switch of a carrier other than the incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the non-ILEC carrier should be paid the incumbent LEC's tandem interconnection rate. DeltaCom argues that each DeltaCom switch serves a geographic area equal to that of several BellSouth local tandems in Alabama. DeltaCom provided a map of its Network (Exhibit CJR-5). DeltaCom also provided a chart in its testimony depicting the areas severed by its switches in Alabama as compared to the BellSouth local tandem switches. DeltaCom explained that its Birmingham switch serves the same area as BellSouth's

Birmingham and Huntsville local tandem switches; DeltaCom's Anniston switch serves the same area as BellSouth's Anniston and Gadsden local tandem switches; and DeltaCom's Montgomery switch serves the same geographic area as BellSouth's Montgomery and Mobile local tandem switches. Tr. 157. DeltaCom argues that its network architecture is such that a single DeltaCom switch is serving the geographic area comparable to multiple BellSouth local tandem switches DeltaCom also provided a listing of each of its forty-six collocation sites in Alabama. (Revised Exhibit CJR-4) DeltaCom argues that while its network is fundamentally different from that of BellSouth, DeltaCom's switches perform a local tandem function delivering local traffic to each collocation site. Tr. 158

The BellSouth Position

BellSouth argues this issue involves two questions: should the Commission adopt the reciprocal compensation rate proposed by DeltaCom and should the Commission allow DeltaCom to recover reciprocal compensation for functions DeltaCom does not perform. BellSouth believes the answer to both questions is no.

Alphonso Varner, testifying for BellSouth, stated that the appropriate rates for reciprocal compensation are the rates approved in the Commission's *UNE Pricing Docket* that are included in Exhibit AJV-1 attached to his testimony. BellSouth argues that DeltaCom has not offered any reason why the Commission's rates should not apply to it as well, particularly when DeltaCom has not presented a cost study or any empirical basis to find that DeltaCom's costs of transporting and terminating local traffic are different than the costs determined in Docket No. 26029. (BellSouth's Brief at page 33).

BellSouth argues that if a call is not handled by a switch on a tandem basis, it is not appropriate to pay reciprocal compensation for the tandem switching function. BellSouth indicated that it would pay the tandem interconnection rate only if DeltaCom's switch is performing both the tandem and end office functions. Mr. Varner stated that DeltaCom is seeking to be compensated for the cost of equipment it does not own and for functionality it does not provide. Tr. 844. BellSouth argues that DeltaCom's claim that it is entitled to the tandem rate is loosely based upon the FCC Rule 47 CFR §51.711(a)(3).

Discussion of Issue 3 (2) - Reciprocal Compensation Rates

Having determined that the Commission has the jurisdiction to establish inter-carrier compensation for local traffic including ISP-bound traffic and that reciprocal compensation is the most appropriate cost recovery mechanism, we now turn to an assessment of the rates that should apply to reciprocal compensation. DeltaCom argues that the rate of \$.009 in the existing agreement should continue; or as a compromise, the rate should be set at \$.0045 and reduced over time until the rate equals elemental rates established by the Commission for BellSouth. BellSouth argues that the appropriate rate for reciprocal compensation is the rates determined by the Commission in it *UNE Pricing Docket.*

The \$ .009 rate in DeltaCom's existing agreement was approved by this Commission under the criteria set out by the Act in §252 (a) for negotiated agreements. The Commission did not determine if that rate met the TELRIC pricing standards. While the panel recognizes that DeltaCom's cost may be higher than BellSouth's costs, there is no cost study or empirical data in the record to support the S.009 existing rate or compromise rate of S.0045 proposed by DeltaCom.

The panel believes that reciprocal compensation based on the elemental rates of transport, end office, and tandem switching adopted on August 25, 1998, in our *UNE Pricing Docket* and equaling S.00351 per minute is the most reasonable and appropriate interim inter-carrier compensation mechanism we can require. The adoption of such a rate ensures that BellSouth will incur the same costs as it would if the calls in question were delivered to a BellSouth-served customer.

We further believe that adopting a TELRIC-based compensation mechanism is more likely to be consistent with any federal rule, which may ultimately be adopted by the FCC. Such a mechanism certainly appears to be consistent with the FCC's traditional treatment of ISP-bound traffic and ISPs generally. Perhaps most importantly, however, the interim inter-carrier compensation mechanism required herein appears to be the most reasonable means of ensuring that ISP-bound traffic does not become a class of traffic for which there is no mechanism of cost recovery.

We must now consider whether the record establishes that DeltaCom is eligible for the tandem interconnection rate pursuant to the guidelines established by 47 CFR §51.711. The panel does not agree with BellSouth's characterization that DeltaCom's claim that it is entitled to the tandem interconnection rate is based only "loosely" on the FCC's rules. The panel believes that FCC's Rule 51.711(a)(3) expressly states that where the interconnecting carrier's switch serves the geographic area comparable to that served by the ILEC's tandem switch, the appropriate interconnection rate for the interconnecting carrier is the tandem interconnection rate. We find nothing in the record to controvert DeltaCom's claim that its switches are geographically comparable to BellSouth's tandem switch. The exhibits provided by DeltaCom (CJR-4 and CJR-5) showing the service area of its switches, the testimony comparing the areas served by DeltaCom's switches to the areas served by BellSouth's local tandem switches, and the forty-six collocation sites it has developed in BellSouth' central offices clearly demonstrates that DeltaCom is serving a geographic area and customers comparable to that served by BellSouth.

We note that BellSouth's further arguments concerning distinctions in functional equivalency are not requirements of the aforementioned FCC Rule. Even if FCC Rule 51.711 is read to include such functional equivalency requirements, as BellSouth seems to suggest, we find that DeltaCom has demonstrated the requisite functional equivalency.

The Conclusion of the Arbitration Panel as to Issue No. 3(2)

Based on the foregoing discussion, the Arbitration Panel concludes that DeltaCom's switches serve an area geographically comparable to that served by BellSouth's tandem switches and provides functionality comparable to that provided by BellSouth's tandem switches, therefore, DeltaCom should receive BellSouth's tandem interconnection rate. We accordingly adopt the findings and conclusions of the Arbitration Panel in that regard as our own. We conclude that BellSouth should be required to pay reciprocal compensation for all calls that are properly routed over local trunks, including calls to Information Service Providers (ISPs) at an interim rate of S0.00351 based on the elemental rates for transport, end office and tandem switching adopted in our *UNE Pricing Docket* and in the ICG Arbitration Order in Docket 27069. The rates are being set on an interim basis due to the uncertainty created by the Eighth Circuit Court Decision in response to the Supreme Court Remand in *Iowa Utilities Board, et. Al v. FCC*, (July 18, 2000), as well the DC Circuit Court decision in *Bell Atlantic Telephone Companies vs. FCC*, (March 24, 2000).

The Findings and Conclusions of the Commission as to Issue 3(2)

The Commission concurs with the findings and conclusions of the Arbitration Panel concerning this issue. We accordingly adopt the findings and conclusions of the Arbitration Panel in that regard as our own. We concur with the Arbitration Panel's finding that BellSouth should be required to pay reciprocal compensation for all calls that are properly routed over local trunks, including calls to Information Service Providers (ISPs) at an interim rate of $0.00351 based on the elemental rates for transport, end office and tandem switching adopted in our *UNE Pricing Docket* and in the ICG Arbitration Order in Docket 27069. As ordered in our Findings and Conclusions as to Issue 3(1) herein, all ISP-bound calls properly routed over local trunks shall be tracked by the parties so that the $0.00351 rate for such traffic can be retroactively "trued-up" to the level of inter-carrier compensation ultimately adopted by the Commission in its generic docket on reciprocal compensation.

IT IS SO ORDERED BY THE COMMISSION

Issue 4(a) - Cageless Collocation (Att. 4 - 6.4)

Should BellSouth provide cageless collocation to ITC^DeltaCom 30 days after a complete application is filed?

The ITC^DeltaCom Position

DeltaCom contends that the 90 to 130 business days provisioning interval assumes space identification, build-outs of enclosures, power and HVAC, all of which are not necessary in a cageless environment. Don J. Wood testified that because these functions were not necessary under cageless collocation, the provisioning interval should be shorter than the provisioning interval for caged collocation. Tr. 281. Wood stated that DeltaCom had requested a 30-day provisioning interval for cageless collocation. Tr. 301. Wood also stated that cageless collocation was akin to virtual collocation such that a telecommunications engineer could not distinguish between the two arrangements in a central office. Tr. 279.

The BellSouth Position

BellSouth has proposed an interval of not later than 90 business days for ordinary circumstances and within 130 business days for extraordinary circumstances. Milner, Tr. 1187-1188. BellSouth insists that these intervals are in compliance with the FCC *First Report and Order and Further Notice of Proposed Rulemaking*, CC Docket 98-147. BellSouth argues that in order to provision a collocation arrangement, BellSouth may have to complete space conditioning, add to or upgrade the heating, ventilation, and air conditioning system for the area, add to or upgrade the power plant capacity, and power distribution mechanism, or build out network infrastructure components such as the number of cross connects requested. BellSouth contends that this area and network infrastructure must take place regardless of the type of physical collocation arrangement selected. Milner, Tr. 1186-1187.

Discussion of Issue 4

In its Report and Order regarding *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, the Federal Communications Commission (FCC) addressed the collocation issue. The FCC defined cageless collocation as physical collocation, which does not require the use of collocation cages.[20] The FCC further stated that the use of caged collocation space results in the inefficient use of the limited space in a LEC premises and that the efficient use of collocation is critical to the continued development of the competitive telecommunications market[21] The FCC stated in its conclusion that the requirement of cageless collocation serves the public interest because it reduces the cost of collocation for competitive LEC's and reduces the likelihood of premature space exhaustion.[22] The FCC further stated that it would rely on the state commissions to ensure that prices for these smaller collocation spaces are appropriate given the amount of space in the incumbent LEC"s premises actually occupied by the new entrants.

The FCC concluded that the deployment by any LEC of a collocation arrangement gives rise to a rebuttable presumption in favor of a competitive LEC seeking collocation in any incumbent premises that such arrangement is technically feasible.[23] The FCC believed that this presumption of technical feasibility would encourage incumbent LECs to explore a wide variety of collocation arrangements and make such arrangements available in a reasonable and timely fashion. The FCC further stated that a competitive LEC seeking collocation in New York may, pursuant to this rule, request a collocation arrangement that is made available to competitors by a different incumbent LEC in Texas, with the burden resting with the incumbent LEC in New York to prove that the Texas arrangement is not technically feasible.

The FCC concluded that incumbent LECs must allocate space preparation, security measures, and other collocation charges on a pro-rata basis so the first collocator in a particular incumbent premises will not be responsible for the entire cost of the site preparation.[24] Again the FCC referred the matter of determining the proper costs to the states.

We note that on March 17, 2000, the U. S. Court of Appeals for the District of Columbia Circuit decided in case No. 99-1176 that the FCC had erred *In the Matter of the Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147. First the court stated that the FCC had exceeded the requirements that the ILEC allow collocation of competitors' equipment. The Telecommunications Act of 1996 only requires that the ILEC provide collocation of competitors' equipment to the extent that such equipment is necessary, required, or indispensable to interconnection or access to unbundled network elements. The Court stated that anything beyond this demands a more detailed explanation from the FCC. The Court stated that the FCC also erred in allowing the competitors to choose any unused space within the incumbent's premises to the extent technically feasible. The Court indicated that the FCC did not provide a good reason as to why a competitor opposed

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[20] Report and Order regarding *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, ¶ 38

[21] Id ¶ 42

[22] Id ¶ 43

[23] Id. 45

to the LEC should choose where to establish collocation on the LEC's property. All other provisions of the order were upheld. Thus, the determinations being considered in this case are not affected by the Court's ruling.

The FCC concluded that an incumbent LEC may not impose unreasonable restrictions on the time period, which it will consider applications for collocation space.[25] The FCC also concluded that an incumbent LEC may not refuse to consider an application for collocation space submitted by a competitor while that competitor's state certification is pending or before the competitor and incumbent LEC have entered into a final interconnection agreement. Although not adopting specific intervals, the FCC retained the authority to do so in the future, if necessary.[26] The FCC indicated that the record in the proceeding reflected the competitive harm suffered by new entrants who had to wait six to eight months after their initial collocation request. In the same paragraph the FCC pointed to the Texas PUC requirement that Southwestern Bell Telephone Company provide competitive LECs with information on space availability in a Southwest Bell premises within ten days of receipt of a collocation request. The FCC noted that both GTE and Bell Atlantic stated that they respond to physical collocation requests within ten days by advising the carrier whether space is available or not[27] The FCC further stated that ten days seemed to be a reasonable period.

We note that the parties have relied upon other states' decisions to bolster their arguments. In that regard, we note that Virginia's staff in SCC-Va.-No. 218, Case No. PUC990101 recommended a provisioning interval for cageless collocation of 60 calendar days or less. On page 39, the staff noted similarities between cageless collocation and virtual collocation. The Louisiana staff also recommended 60 calendar days for provisioning cageless collocation in LPSC Docket No. U-24206.

The state of New York in Case 99 - C -0715 and Case 95-C-0657 approved a provisioning of 76 business days where Bell Atlantic - New York equipment is secured and 105 business days where Bell Atlantic equipment is not secured, page 3 of New York Commission's order.

The Texas Commission, Order No. 51, Project 16251, *Investigation of Southwestern Bell Telephone Company's (SBC's) Entry into the Texas IntraLATA Telecommunications Market*, ordered SBC to provision active collocation space within 70 calendar days with SBC installing the bays/racks and within 55 calendar days if the CLEC installs the bays/racks.

The Florida Commission utilized 90 calendar days as set forth in FPSC Order No. PSC -96-1579-FOF-TP. In that December 31, 1996, Order the Florida Commission concluded that provisioning intervals of 90 days for physical collocation and 60 days for virtual collocation were appropriate. In the South Carolina Order Docket No. 1999-259-C - Order No. 1999-690 page 73, the South Carolina Commission found that 90 calendar days was sufficient time for BellSouth to provision cageless collocation. However, we note that paragraph 54 of the FCC's *Advanced Services Order FCC 99-48, CC Docket No. 98-147* the FCC stated that although not

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[24] Id. 51
[25] Id. ¶ 53
[26] Id. ¶ 54

adopting specific provisioning intervals, the FCC emphasized the importance of timely provisioning. In footnote 131 the FCC noted the efforts of the Texas and New York Commissions.

Florida and South Carolina are in agreement that 90 calendar days is sufficient to provision cageless collocation. The Louisiana and Virginia staffs proposed 60 calendar days for the cageless collocation provisioning interval.

Both parties agree that cageless collocation dispenses with the requirement of designing and building a cage or enclosure for the collocated equipment. BellSouth contends that additional lighting, heating, and HVAC may be necessary for cageless collocation. However, the similarities between cageless collocation and virtual collocation are obvious. It is also obvious caged collocation requires more infrastructure than either cageless collocation or virtual collocation. Thus, the provisioning interval for cageless collocation should be less than that for caged collocation.

The FCC stated that the deployment by any LEC of a collocation arrangement gives rise to the rebuttable presumption in favor of the CLEC seeking collocation in any incumbent premises that such arrangement is technically feasible. We believe we can apply this same premise to provisioning intervals.

We agree with Mr. Wood and the Virginia and Louisiana staffs that cageless collocation appears similar to virtual collocation and recommend that the Commission provide for 60 calendar days for cageless collocation provisioning.

Conclusion on Issue 4

Based upon the foregoing, the Arbitration panel concludes that BellSouth should be required to provide DeltaCom information on space availability within ten days from the receipt of a request for collocation by DeltaCom and that BellSouth provision cageless collocation within 60 calendar days of a request for cageless collocation by DeltaCom. If there are extenuating circumstances involving the provisioning of cageless collocation, BellSouth should provision cageless collocation within 90 calendar days.

The Findings and Conclusions of the Commission as to Issue No. 4

The Commissions concurs with the findings and conclusions of the Arbitration Panel concerning this issue. We accordingly adopt the findings and conclusions of the Arbitration Panel in that regard as our own.

IT IS SO ORDERED BY THE COMMISSION

Issue 5 Local Interconnection (Att. 3)

Should the parties continue operating under existing local interconnection arrangements?

The ITC^DeltaCom Position

DeltaCom asserts that this issue is broken down into subtopics in the testimony of its witnesses and that the Commission should consider these subtopics when making its decision

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[37] Id. ¶ 55

in this case. DeltaCom claims that the language in the old interconnection agreement has provisions within the agreement for cross-connect fees, reconfiguration charges, or network redesigns and NXX translations which are compliant with Section 252(e)(2)(A) of the Telecommunications Act of 1996. However, according to DeltaCom that language covering those issues should be renewed and incorporated in the new agreement between the two parties.

DeltaCom avers that the terms local traffic and trunking options are defined in the old agreement that has governed the relationship between the parties for the past two years and should be incorporated in the new agreement. DeltaCom states that BellSouth wants to change the definition of local traffic to exclude ISP-bound traffic from the definition of local traffic. DeltaCom believes that the language in the old agreement concerning parameters for routing of DeltaCom's originating traffic and the exchange of each party's transit was found compliant with Section 252 of the Act and should be included in the new agreement.

DeltaCom also seeks to have language regarding binding forecasts included in the new interconnection agreement. According to DeltaCom's witness, Mr. Hyde, if language regarding binding forecasts is included in the agreement, BellSouth will be assured that its investment in network build-out will be recouped. Tr. 589-590. DeltaCom states that BellSouth is not opposed to binding forecasts, but BellSouth states that it is not obligated to accept them.

The BellSouth Position

BellSouth argues that DeltaCom is asking the Commission to permit DeltaCom to operate under the terms of the expired interconnection agreement while also asking the Commission to arbitrate proposed terms for a new interconnection agreement. BellSouth contends that DeltaCom does not identify the provisions under the old agreement under which it seeks to continue to operate. According to BellSouth, DeltaCom only identifies some broad categories such as network designs, trunking options, and routing parameters without specifying its position regarding these issues. BellSouth indicates that DeltaCom has only identified the issue of binding forecast, which has largely been settled by the parties.

Discussion of Issue 5

Language in the old agreement stops short of requiring binding forecasts but refers to "working cooperatively." That agreement requires both parties to review engineering requirements on a quarterly basis and requires the parties to establish forecasts for trunk utilization. That agreement also states that new trunks will be added as reasonably warranted. Further, that agreement states that new trunks will be implemented as dictated by engineering requirements for both BellSouth and DeltaCom. Also, this Commission required binding forecasts in its final order in the ICG/BellSouth Arbitration.

We agree with DeltaCom that the wording in the existing agreement sets the requirements for both parties. We believe that this wording requires BellSouth to provide network buildout. As DeltaCom has stated, BellSouth recoups the investment for this buildout. Thus, we see no reason for BellSouth's objections.

The existing interconnection agreement provides that the party operating the wire center shall enable interconnection of collocators and shall charge a cross-connect fee of one-half the otherwise applicable standard tariff or contract a special access cross-connect rate to the collocated party and the identical rate to collocated party. (Page 24 of DeltaCom/BellSouth